

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THOMAS DAVIDSON, et al.,
Plaintiffs,
v.
APPLE, INC.,
Defendant.

Case No. [5:16-cv-04942-LHK](#) (HRL)

**NOTICE OF HEARING AND INTERIM
ORDER RE DISCOVERY DISPUTE
JOINT REPORT NO. 1**

Re: Dkt. No. 129

The parties in this putative consumer class action have filed Discovery Dispute Joint Report #1 (“DDJR#1”) because they cannot agree on a protocol to control the inspection and testing of the plaintiffs’ allegedly defective iPhones.

The court sets a hearing on DDJR#1 for **November 8, 2017 at 1:30 PM**. Lead counsel shall appear in person.

The court wishes counsel to be particularly prepared to address the following:

1. Is there information, data, or diagnostic markers in the iPhones that are accessible only to Apple?
2. Can Apple, on account of proprietary diagnostic tools, analyze or interpret data accessed or extracted from the iPhones in a way that plaintiffs cannot?
3. Apple tells the court that plaintiffs can discover the same “underlying facts”

1 through their own testing as Apple can through its testing. Define “underlying facts.”

2 4. Identify and describe what are “non-proprietary tests” as that phrase was used by
3 the parties.

4 5. Can Apple describe its proprietary tests?

5 6. Is identifying or describing a test to be run disclosing work product? Does it matter
6 if the test is proprietary or non-proprietary? How about the test results?

7 7. Is any data accessed or extracted from the iPhones “work product,” or is it simply
8 “factual”?

9 8. Apple’s description of “non-destructive” testing seems to leave room for alteration,
10 correction, deletion, or addition of data during a test so long as it does not “permanently alter the
11 physical appearance or functionality of the iPhones.” Is that correct? Does it matter?

12 9. How would the neutral expert know (or, how would plaintiffs know if the test were
13 described to them), that a test was non-destructive?

14 10. Since the plaintiffs’ claim appears to be based on an internal hardware defect, and
15 all agree that the phone case is not to be opened, what type of test might be destructive of
16 something important?

17 11. How would anyone know if something had been “destroyed”?

18 12. Would creation of a mirror image of each iPhone prior to testing be sufficient
19 protection in the event of any “destruction” during testing?

20 The court encourages the parties to meet and confer again to try to reach agreement on a
21 test protocol. They are surely better informed than this court on testing and on smart phone
22 technology and ought to be able to craft something that will take into account and fairly balance
23 their legitimate interests.

24 SO ORDERED.

25 Dated: October 26, 2017

26
27 
28
HOWARD R. LLOYD
United States Magistrate Judge